United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original Affidavit of Mailing

74-1947

To be argued by
ROBERT L. CLAREY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1947

UNITED STATES OF AMERICA,

Appellee,

—against—

HENRY STUART BROWN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Appellant Henry Stuart Brown appeals from a judgment of the United States District Court for the Eastern District of New York (Mishler, *Ch. J.*) entered July 11, 1974, following a jury trial convicting him on Count Two of a two count indictment in which he was the only named defendant. That count charged appellant with the $14,748.00 armed robbery on January 10, 1972 of the Banker's Trust Company, 896 DeKalb Avenue, Brooklyn, New York, Title 18, United States Code, Section 2113(d) and Section 2. As to Count One, in light of the jury's verdict on Count Two, they did not, as the District Court instructed them they need not, return a verdict on this lesser count charging the same bank robbery in violation of Title 18, United States Code, Section 2113(a). On the count on which appellant was found guilty, he was sentenced to twenty years in prison, to run consecutively with a term presently

being served by him in the State of Missouri, of twenty-five years.*

On this appeal, appellant makes four claims: (1) that a preindictment delay of 17 months requires dismissal of the indictment; (2) that the cross-examination of the accomplice witness, Wilbur Roland, was unduly restricted by Chief Judge Mishler; (3) that expert testimony was improperly received regarding the bank surveillance photographs; and (4) that the Court erred in its rulings and charge respecting the inference to be drawn from a party's failure to call a witness. Appellant does not challenge the sufficiency of the evidence.

Statement of Facts

On the evening of January 5, 1972 appellant met with four other persons at an apartment on Montgomery Street in Brooklyn. Present at the apartment in addition to appellant were Wilbur Roland, who testified as a witness at appellant's trial, Woody Green, Thomas McCreary, Melvin Kearney and several female acquaintances one of whom lived in the apartment. During a conversation that evening with the four other men, appellant related that he had been inside a bank that afternoon at the corner of DeKalb and Sumner Avenues in Brooklyn, that he had seen only one surveillance camera, and that it would be an easy target for a robbery (203-204).** In turn, the other four men agreed to accompany appellant to the vicinity of DeKalb and Sumner to look at the bank (305).

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* On July 24, 1972 appellant pled guilty in Circuit Court, City of St. Louis, Missouri, to three counts of assault with intent to kill on which he was sentenced on September 29, 1972 to three concurrent twenty-five year sentences.

** Page references in parenthesis refer to the trial transcript.

The following morning, Thursday, January 6th, appellant, Woody Green and Roland were driven to the vicinity of the Banker's Trust Company at 896 DeKalb Avenue on the corner of Sumner Avenue by a person who was known to Roland only by his last name, "Jackson" (206). While none of them entered the bank, they did sit in Jackson's car on Sumner Avenue directly across from the bank and noted that the windows of the bank were situated at such a height as to make it impossible to see into the bank from the street (207). After observing the bank for some time, the four proceeded to Green's apartment located at the corner of Reid and Bainbridge Avenues in Brooklyn. There the group voiced their agreement with appellant that the bank would indeed be a good one to rob and that the robbery should be committed the following week (207).

Thereafter, on Sunday evening, January 9, 1972, appellant, Woody Green and Roland met at a third apartment where Thomas McCreary lived and which, like the first meeting place, was also located on Montgomery Street in Brooklyn (210). Since Jackson, the owner of the car driven on January 6th, could not be contacted it was decided that a car for use in the bank robbery would have to be stolen that evening (210-211).

With this purpose in mind, Woody Green and Roland set out on foot to find a suitable car, leaving appellant behind at McCreary's apartment (211). At approximately 11:00 P.M., after a short bus ride, they happened upon a car rental agency on Church Avenue in Brooklyn, the name and exact address of which Roland could not recall (212). By threatening the attendant at the rental agency with guns, Roland and Green obtained the keys to a small foreign rental car, of unknown make and registration, parked on the street across from the agency (213). Roland driving, the two proceeded from the rental agency in the stolen car directly to the vicinity of the bank and, at the corner of Kosciusko and Sumner, one block from the bank,

they parked the car where they could easily obtain it the following morning for use in the robbery (213-214). Green and Roland then took a bus to McCreary's apartment on Montgomery Street to report to appellant their success in stealing a car for use in the bank robbery (214).

Following their arrival, appellant informed them that he and Melvin Kearney had already decided that they would meet early the following morning, Monday, January 10th, at Woody Green's apartment to finalize their plans and then proceed to commit the bank robbery (215). Thomas McCreary was not to actively participate in the robbery (212).

On the morning of January 10, each member of the group agreed on the role he was to play in the bank robbery. Roland would drive the getaway car, Green would "take care of" the bank guard and Kearney would cover the customers and employees from the middle of the bank leaving appellant free to get behind the counter to empty the tellers' drawers (216). Once these plans were finalized, at approximately 8:45 A.M., appellant and his three companions traveled by bus to the vicinity of the bank stopping on their way to the bus to allow Woody Green to purchase a paper shopping bag in which to carry the proceeds from the anticipated robbery (217). At DeKalb and Sumner, after getting off the bus, appellant, Kearney and Green waited on the corner across DeKalb Avenue from the bank while Roland proceeded on foot, one block to Kosciusko and Sumner, to pick up the stolen car parked there the previous evening (218). Thereafter, when appellant and his two companions saw Roland driving on Sumner toward the bank, they immediately entered the bank; the time was approximately 9:05 A.M. (72). Roland parked directly in front of the bank entrance, which faced Sumner, to await for their exit (219).

Once inside the bank either Green or Kearney said: "O.K. this is a hold-up, everybody on the floor" (77-129).* At that point, appellant walked to the rear of the bank to the officers' platform area and, after ascertaining that all of the employees and customers in that area had complied with the order to get on the floor, he tried to gain entrance to the tellers' area by attempting to open a locked door adjacent to the platform area (131). In making that attempt, appellant left prints from three of the fingers on his left hand.**

After unsuccessfully attempting to open the door and while Kearney and Green held the employees, bank guard and customers on the floor at gunpoint (129), appellant walked around to the front of the tellers' counter and, using a chair to step on, vaulted over the counter and began searching the last two tellers' drawers for money (Gov't.

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* During appellant's trial, the Government also called as witnesses, Earl Francis and Emory Mascoll, two employees of Bankers Trust who were present in the bank during this robbery. Francis, the manager, identified the FDIC certificate to establish jurisdiction and testified as to an audit which established the loss (70-71, 89-90). Both he and Mascoll described the actual robbery although neither could identify appellant as one of the robbers. Additionally, Mascoll testified on direct examination that approximately one week before trial, and two years and four months after the robbery, he was shown a spread of photographs (which included appellant's picture) from which he picked the wrong picture after viewing the spread for fifteen minutes (145).

** Those fingerprints were later that morning lifted from the outside of the door by George Small of the Federal Bureau of Investigation (438-439). It was established at trial that the entire surface of that door had been thoroughly wiped with a wet, soapy cloth by the bank custodian after business hours on Friday, January 7, 1972, the business day immediately preceding the day of the robbery (430-435). In addition, surveillance photographs showed that appellant's left hand was bare during the robbery and that he wore a glove only on his right hand (Gov't Ex. 31-D).

Ex. 19, 142). When he found no money, he turned to Emory Mascoll, the assistant manager, who was also behind the counter at the time, and demanded at gunpoint to know where the money was kept (135). Mascoll immediately pointed to the forward tellers' drawers whereupon appellant proceeded to remove the money from them and place it in the shopping bag purchased earlier by Green (136). Once the drawers were empty, appellant climbed back over the counter and exited the bank preceded by Kearney and followed by Green (136, 220; Gov't. Exs. 4E, 4G and 34).*

From the bank, Roland and his three passengers proceeded up Sumner, turned left on Bainbridge and drove to the vicinity of Green's apartment where he dropped the other three off before parking the stolen car and abandoning it at an unknown location approximately two blocks away (221). He then returned to Green's apartment where he and the others divided the proceeds of the robbery four ways, each receiving approximately thirty-seven hundred dollars (223).

Appellant did not testify in his defense and introduced no evidence

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* As the robbers were fleeing the scene, appellant remembered that he had left his gun behind in the bank (220). The gun, discovered on the tellers' counter immediately after the bank robbery, was picked up and removed from the bank by Special Agent Richard Berry of the FBI (113). It was received in evidence (Gov't. Ex. 22) at appellant's trial and was further identified at trial by Patrolman Carl Sutherland of the New York City Police Department as his service revolver which had been taken from him by four young blacks during an armed robbery on December 12, 1971 at Lindy's Bar at Myrtle and Kent Avenues in Brooklyn (181). Though Sutherland could not identify appellant as one of the four who took his gun on December 12th, the accomplice witness Roland testified that he, together with appellant and Woody Green, had committed the December 12th bar robbery, and further that it was appellant who ultimately received the gun that night although Green had taken it from Patrolman Sutherland (202-203).

ARGUMENT

POINT I

Appellant's claimed violation of the Due Process Clause by reason of the 17 month delay between the identification of his fingerprints and the indictment was properly denied by the District Court.

Relying upon language in *United States* v. *Marion,* 404 U.S. 307 (1971) and this Court's subsequent decision in *United States* v. *Ferrara,* 458 F.2d 868 (2d Cir.), *cert. denied,* 409 U.S. 986 (1972), appellant contends that Chief Judge Mishler mistakenly denied his pre-trial motion to dismiss the indictment because of the 17 month hiatus between the identification of his fingerprints and his indictment. He argues "that an indictment must be dismissed where a defendant has been prejudiced by undue delay between the discovery of the [defendant's participation in the] crime and indictment *or* where the delay was an intentional device to gain tactical advantage over the accused" (emphasis in original) (Appellant's Brief, p. 5). Although appellant claims no specific prejudice on appeal, he does argue that the Government was bound to explain, at a separate hearing, why it waited 17 months following the fingerprint identification, to indict him.* Appellant's contention is without merit.

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* Appellant does not claim in any respect that the Government here failed to comply with either the Second Circuit Rules for Prompt Disposition of Criminal Cases or the Eastern District's Rule 50(b) Plan for Achieving Prompt Disposition of Criminal Cases.

It should be noted, additionally, that this prosecution began with appellant's indictment on November 1, 1973. He had never been previously arrested on this charge and no complaint had ever been filed. On November 9, 1973 he was arraigned before Chief Judge Mishler and, since he was already in state custody (See

[Footnote continued on following page]

In *Marion,* the Supreme Court rejected the argument, advanced there, that the "possibility of prejudice" (*id.,* at 322) arising from a pre-indictment delay in prosecution was sufficient to invoke the speedy trial protection of the Sixth Amendment. Sufficient protection was already available, the Court observed, through statutes of limitation (*id.,* at 323). Additionally, quoting approvingly from other authorities, the Court recognized that such an extension of the guarantee would "create procedural problems"; that "'[a]llowing inquiry into when the police could have arrested or when the prosecutor could have charged would raise difficult problems of proof'"; and that "'the Court would be engaged in lengthy hearings in every case to determine whether or not the prosecuting authorities had proceeded deligently or otherwise'" (*id.,* at 321 n. 13).

Nevertheless, the Court in *Marion* did leave open the Due Process claim of a defendant who, beyond potential prejudice, could assert and demonstrate that he was actually prejudiced by a purposeful preindictment delay. The Court, however, was unclear as to whether a showing of actual prejudice would have to be accompanied by a showing as well, "that the delay was an intentional device to gain tactical advantage over the accused [footnote omitted]") (*id.,* at 324). The Court's full statement on the question was as follows (404 U.S. at 324-325):

> Nevertheless, since a criminal trial is the likely consequence of our judgment and since appellees

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supra, p. 2, n.), he was remanded without bail. Trial was at that time set for February 18, 1974 at the request of appellant. The Government's written Notice of Readiness for trial was filed the same day, November 9, 1973. The February 18, 1974 date was adjourned, at appellant's request, since he was at the time a defendant in a murder trial in New York County. On March 26, 1974, appellant affirmatively and on the record waived his right to a speedy trial pursuant to the 50(b) Plan. The trial was at that time set for May 6, 1974 and did in fact begin on that date.

may claim actual prejudice to their defense, it is appropriate to note here that the statute of limitations does not fully define the appellee's rights with respect to the events occurring prior to indictment. Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused. Cf. *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Napue* v. *Illinois*, 360 U.S. 264 (1959). However, we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution. To accommodate the sound administration of justice to the rights of the defendant to a fiar trial will necessarily involve a delicate judgment based on the circumstances of each case. It would be unwise at this juncture to attempt to forecast our decision in such cases (footnotes omitted).

The decisions of this Court prior to *Marion*, which dealt with claims of preindictment delay, focused solely on the issue of prejudice and did not require a showing that the delay was part of a Government stratagem, see, e.g., *United States* v. *Scully*, 415 F.2d 680, 683 (2d Cir. 1969); *United States* v. *Capaldo*, 402 F.2d 821, 823 (2d Cir. 1968), *cert. denied*, 394 U.S. 989 (1969). Thereafter, in *United States* v. *Schwartz*, 464 F.2d 499, 503 n. 5 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972), it was noted that *Marion* "set forth no guideline for making the 'delicate judgment' . . . as to

when actual prejudice alone warrants the dismissal of an indictment for pre-accusation delay." Preceding that comment, however, the Court in *Schwartz* seemingly attributed to the *Marion* decision a required showing of both prejudice *and* an intent by the Government to gain a tactical advantage.* Nonetheless, the Court in *Schwartz*—though recognizing that no claim of untoward Government conduct had been made—did treat the sole issue of prejudice in a manner which would suggest that the Court considered that, under certain circumstances, prejudice alone might be sufficient.

The other decisions of this Court construing *Marion* have, as in *Schwartz*, focused on the element of prejudice. And, while they have not eliminated the additional requirement—suggested by the Court in *Marion*—that prejudice be combined with a showing of improper Government conduct, they have never intimated that the ambiguity in *Marion* could be turned on its head as appellant asserts, much less held that misconduct alone would be sufficient. See, e.g., *United States* v. *Mallah*, — F.2d — (2d Cir. Slip opinions, 5475, 5506-5507; decided September 23, 1974); *United States* v. *Castellanos*, 478 F.2d 749, 753 n. 4 (2d Cir. 1973); *United States* v. *Handel*, 464 F.2d 679, 680-681 (2d Cir.), *cert. denied*, 409 U.S. 984 (1972); *United States* v. *Ianelli*, 461 F.2d 483, 485 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972); *United States* v. *Ruisi*, 460 F.2d 153, 157 (2d Cir.), *cert. denied*, 409 U.S. 914 (1972); *United States* v. *Ferrara, supra; United States* v. *Briggs*, 457 F.2d 908, 911 (2d Cir.), *cert. denied*, 408 U.S. 961 (1972); *United States* v. *Stein*, 456 F.2d 844, 848 (2d Cir.), *cert. denied*, 408 U.S. 922 (1972); *United States* v. *Wenger*, 455 F.2d 308, 310 (2d Cir.), *cert. denied*, 407 U.S. 920 (1972).**

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* The brief of the United States in the *Schwartz* case (at p. 21 n.) had argued just that interpretation of *Marion*.

** Concededly, the Ninth Circuit does adopt appellant's contention in *United States* v. *Erickson*, 472 F.2d 505, 507 (9th Cir. 1973) and the Eighth Circuit appears to be inclined in the same direction. See *United States* v. *Jackson*, — F.2d — (8th Cir.;

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Indeed, in the last cited case which was the first decision following *Marion,* this Court expressly noted:

> "Similarly unpersuasive is the contention that the 'deliberate delay' in returning the indictment requires dismissal. The indictment was returned within the statute of limitations and no prejudice resulted from the pre-indictment delay. *United States* v. *Marion,* . . ."

Moreover, in *Ianelli* (461 F.2d at 485 n. 2) where the ambiguity in *Marion* was expressly noted, the Court nevertheless remarked that defendants claiming a violation of the Due Process Clause by reason of preindictment delay ". . . must at least show that they suffered actual prejudice in preparing a defense." Accord: *United States* v. *McClure,* 473 F.2d 81, 83 (D.C. Cir. 1972). *Ianelli,* in turn has been followed in this Court's most recent opinion in *United States* v. *Mallah, supra,* at 5506-5507, where, despite an unexplained failure by the Government to charge the appellant Pacelli in earlier indictments, this Court stated: ". . . we do not believe that *where there has been no showing of prejudice* this exercise of prosecutorial discretion is the type of action which the *Marion* court had in mind when it suggested that preindictment delay might invalidate

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16 Cr. L. Rep. 2020; decided September 13, 1974). Those decisions, however, are clearly contrary to the rule in this Circuit and, in all events, neither of them went so far as to dismiss the indictment. Moreover, appellant's reliance on *United States* v. *Ferrara, supra,* is misplaced. In *Ferrara,* which was decided after *Wenger,* but without citation to it, and before *Ianelli,* the Court held that the appellant had demonstrated neither prejudice nor misconduct. The Court never stated that proof of the latter would suffice but simply implied by its use of the disjunctive the obvious: That a claim of purposeful delay complements and, thereby, lends impetus to an otherwise colorable claim of prejudice. Given the express holdings in *Wenger, Ianelli* and *Mallah, Ferrara* as well as *United States* v. *Stein, supra,* can hardly be read otherwise.

a conviction if that delay were designed 'to harass' a defendant" (emphasis added).*

In this case, appellant did not testify. He offered no defense other than through the cross-examination of the Government witnesses. He has made no assertion of material or specific prejudice.** Judge Mishler properly characterized appellant's allegation as "broad, general, vague and conclusory" (Appellant's Appendix, 15a). His claimed violation of the Due Process Clause, then, amounts to no more than a request for the same kind of wasteful and needless hearing disparaged by the Court in *Marion*. It should be denied.

POINT II

The District Court properly limited the cross-examination of the accomplice witness Roland.

Appellant's second claim of error concerns the trial court's refusal, on the grounds of irrelevance and potential prejudice to both sides, to permit appellant's trial counsel to cross-examine Wilbur Roland, the Government's accomplice witness, as to appellant's membership in the so-called Black Liberation Army and as to consideration allegedly received by Roland for providing information to the Kings County District Attorney concerning that organization. This contention lacks merit.

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* In *Mallah*, the witness Lipsky, provided information against *Pacelli* as early as March, 1972, see *United States* v. *Pacelli*, 491 F.2d 1108, 1112 (2d Cir. 1974) and, while two indictments were subsequently returned (*id.*), it was not until more than a year later (April 13, 1973) that he was indicted for the crimes which he claimed, in *Mallah*, were deliberately held up by the Government.

** At appellant's trial his counsel made a claim of prejudice (a dubious one, at that) resulting from the delay in that he had lost an opportunity to prove that appellant had cashed a check in the robbed bank five or six days before the subject robbery and thus may have left his fingerprints at that time (7-8). However, when Assistant United States Attorney Clarey indicated

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(1)

Appellant's trial counsel began his determined attempt to inject appellant's revolutionary status as a member of the Black Liberation Army into this trial as early as January 11, 1974. On that date, he filed his affidavit stating his intention to seek to place before the jury appellant's membership in the Black Liberation Army as a reason for his indictment (Appellant's Appendix 20a-22a).

The issue was again raised long before trial at a pretrial conference with Chief Judge Mishler on February 1, 1974, at least three months before even the Government knew that Wilbur Roland would be a Government accomplice witness (63). On that date counsel requested that an alleged FBI administrative file on the Black Liberation Army be ordered turned over to him (A. 20).* His stated reason was that the FBI did not "like" the Black Liberation Army and he wanted to explore that specific prejudice in the presence of the jury with any and all FBI witnesses (A. 10). At that time Chief Judge Mishler expressed his desire to exclude from this trial any such collateral political matters and have a trial on bank robbery alone. Nevertheless, Judge Mishler did agree to examine any such file *in camera* to determine if it contained any matters which would indicate a prejudicial attitude toward appellant (A. 21).

Ultimately, prior to trial, the entire FBI administrative file on Appellant (Court Ex. 1) was given over to Chief Judge Mishler for his *in camera* inspection. On the first day of trial, May 6, 1974, the Chief Judge stated that he had read the entire file and was convinced that the matters contained therein were unrelated to this trial (3).

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that the Government would prove that appellant was in the bank on January 6, through the testimony of Roland, counsel abandoned this assertion of prejudice (10).

* All references "A." followed by a page number are to the Government's Appendix.

Also at the outset of trial and before appellant or his counsel knew that Roland would testify, counsel again sought to bring out appellant's revolutionary status in the *voir dire* of the jury (14). After ruling that he wanted a trial on bank robbery charges alone, Judge Mishler stated as follows:

> If you show me some ground to believe a witness is prejudiced against Mr. Brown because of his affiliation with BLA, I may permit examination outside the hearing of the jury to determine that (14).

Such a hearing was in fact held at the commencement of the cross-examination of Wilbur Roland to determine whether appellant's counsel should be permitted to cross-examine Roland concerning, what counsel maintained, was information sought from him by the Kings County District Attorney concerning the "Black Liberation Army" (230-236). This hearing was held at the request of defense counsel after he was provided by the Government with a transcript, as 3500 material, of a conversation between Roland and Kings County Assistant District Attorney David Fruendlich (Gov't Ex. 24; see A. 30-A. 69). At page two of that transcript (A. 31) Assistant District Attorney Fruendlich is quoted as saying to Roland:

> "The information you give us about the *different robberies* (emphasis supplied) involving the Black Liberation Army specifically to an incident involving a hand grenade in Queens and the killing of two policemen in Manhattan. If this information is correct, if this information also helps your testimony which you have to do is testify [sic] in the Grand Jury and the trial from this we could take your case Jack and we will dismiss it. In other words you will not be prosecuted for your robbery charge and the same with the other robbery charge we have discussed (A. 31)."

On the following page of that transcript (A. 31) Roland was told by Fruendlich that the same disposition for Diane Richardson, Roland's girlfriend and accomplice in those robberies, would be discussed at some future time.

Once those promises were made by Fruendlich, Roland proceeded to tell him about his participation with appellant, Green, Kearney and the others in the December 12, 1971 robbery at Lindy's Bar when officer Sutherland's gun was taken and in this bank robbery (A. 34-35, 38-39). During this interview, Roland also related to Fruendlich what he knew about other activities of this group in which he did not participate including another bank robbery (A. 37), and the alleged killing of policemen (A. 42, 50-51).

Roland, however, in this transcribed interview, never made any direct reference to the so-called "Black Liberation Army." In fact his only reference in that interview to any organization was made obliquely during his revelation as to how the proceeds of the instant bank robbery were split:

> ". . . After that we split the money up and that's when they were saying that they were saying that al [sic] that they were going to do with their money, like that's when they said they had this, I don't know if it was this organization or what, you know, but they had to put so much money aside for this organization or something. I don't know what it was for. I never went to any of their meetings. So that's when they put their money aside . . ." (A. 41).

At the conclusion of this hearing Judge Mishler asked Roland if he had any "antagonisms or hate for Mr. Brown because of anything that happened within the Black Liberation Army," to which Roland responded "No" (235).

During another hearing on this subject, out of the presence of the jury, Roland testified on questioning by defense counsel that, although Fruendlich questioned him about the "Black Liberation Army", Roland had told Freundlich that he knew nothing about the Black Liberation Army (300); that he never gave Fruendlich any indication that he might know something about the "BLA" and that he told Fruendlich that he had "never heard of the BLA" (299). Under further questioning by defense counsel, however, Roland seemed to contradict these statements by answering that at the time of his interview with Fruendlich he did know about the BLA (302), but upon questioning by the Court it became clear that Roland was confused by counsel's questioning:

> The Court: Do you have any idea when Mr. Fruendlich got the idea that you knew something about the Black Liberation Army.
>
> The Witness: No. He. He puts another word in as a question (304).

At the conclusion of this second hearing, Judge Mishler reiterated his ruling (305) made at the end of the first hearing on this subject, which was that defense counsel would not be permitted to use the term Black Liberation Army in the presence of the jury because

> ". . . the only purpose of trying to bring it in is to create either sympathy or prejudice, I am talking about, and no other reason" (232).

The trial court did, however, permit defense counsel great latitude in cross-examining Roland as to Roland's interviews wtih Fruendlich and as to the promises made to him by Fruendlich.* That defense counsel took advantage

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* At the outset of Roland's testimony on direct examination before the jury, he made a complete disclosure of his prior

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of this latitude is evident from the amount of time and the great number of questions he asked Roland on these subjects in the presence of the jury (236-240, 252-260, 287-289, 295-299, 306-308).

Thus, it is clear that defense counsel was able to thoroughly and effectively cross-examine Roland without any mention of the words "Black Liberation Army." It is equally clear that counsel's real purpose in attempting to interject the Black Liberation Army into the trial was as Chief Judge Mishler indicated, to create a political atmosphere and to engender either sympathy or prejudice and possibly fear in the minds of the jurors.

(2)

Evidence of motive to falsely can be so little probative force that it may be excluded in the discretion of the trial judge. *United States* v. *Lester,* 248 F.2d 329 (2d Cir. 1957). Even if such evidence has a "substantial logical bearing on the issue," it can be excluded because it interjects "other and disturbing issues into the trial". *United States* v. *Grayson,* 166 F.2d 863, 870 (2d Cir. 1948). In the instant case, the evidence was both of "little probative value" and "interjected other and disturbing issues" and it was clearly in the discretion of the trial court to exclude this testimony. "A defendant's right to elicit such evidence is not boundless, but is subject to reasonable limitations imposed by the trial judge in the exercise of sound discretion. The test for believing whether there has been an abuse of discretion is whether the jury was otherwise in

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criminal record (198-200). Also at the beginning of his direct testimony, Roland disclosed promises by the United States Attorney for the Eastern District of New York and the Kings County District Attorney that, in return for his testimony in the instant case, he would not be prosecuted for this bank robbery and that neither he nor his girlfriend Diane Richardson would be prosecuted in state court for another armed robbery they had committed in Brooklyn subsequent to this bank robbery (200-201).

possession of sufficient information concerning formative events to make a discriminating appraisal of a witness bias and motive. 426 F.2d at 550." *United States* v. *Blackwood,* 456 F.2d 526, 530 (2d Cir.), *cert. denied,* 409 U.S. 863 (1972), citing *United States* v. *Campbell,* 426 F.2d 547, 550 (2d Cir. 1970). See also, *Gordan* v. *United States,* 344 U.S. 414, 417 (1953). This test was clearly satisfied by the lengthy and rigorous cross-examination by counsel for appellant on this subject of bias and motive to falsify. See also, *United States* v. *LaSorsa,* 480 F.2d 522 (2d Cir.), *cert. denied,* 414 U.S. 855 (1973); *United States* v. *Baker,* 494 F.2d 1262 (6th Cir. 1974); *United States* v. *Owens,* 263 F.2d 720 (2d Cir. 1970).

POINT III

No error was committed in connection with the use of expert testimony concerning the surveillance photographs.

Appellant contends that reversible error was committed when the District Court permitted FBI Special Agent Webb to testify as to the similarity of features between the surveillance photographs of appellant in the bank and a posed photograph of appellant. He urges that Webb's testimony fell within the traditional rule that: "Opinion evidence may not be received as to a matter upon which a jury can make an adequate judgment" (Appellant's Brief, p. 15).

Agent Webb's qualifications were impressive (325-328, 355-358) and, indeed, speaking of his testimony in *United States* v. *Fernandez,* 480 F.2d 726, 735 (2d Cir. 1973), this Court characterized his testimony there as "impressive." *

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* Following the qualification of Webb, Judge Mishler nonetheless advised the jury that his finding that Webb was "qualified" "doesn't bind you at all. I just make a preliminary finding to determine whether it may come before you. The weight it should be given and whether you consider Mr. Webb an expert in the field is solely for you" (357-358).

Agent Webb did not simply view the two pictures side by side but, rather, he individually compared those features which were available on both photographs (T-334).* He testified that "the ear lobe of individuals as well as the configuration of the ear itself are distinctive . . . [and] comes closest to being like a fingerprint" (T-334). Agent Webb also made detailed calculations of the approximate height of the person depicted in the surveillance photograph (372-375); a calculation that would be outside the competence of the jury to make. At no time, however, did he venture the "opinion" that appellant had robbed the bank. His most damaging testimony, which was never objected to, was simply that the person depicted in the surveillance photographs was either the same person in the posed photographs "or an individual with the same features . . ." (369).

The foregoing expert testimony, implicitly approved of by this Court in *United States* v. *Fernandez, supra,* and explicitly permitted in *United States* v. *Cairns,* 434 F.2d 643 (9th Cir. 1970) compare, *United States* v. *Brown,* 501 F.2d 146, see also Scott, Photographic Evidence (2d Ed.,

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* For a detailed analysis of the care that was used to insure that the posed photographs would resemble as closely as possible the bank surveillance photos as to distance, height and angle see the trial transcript pp. 338-341. At the conclusion of a voir dire outside the jury's presence Judge Mishler remarked, in response to counsel's charge that Webb's anticipated testimony was not "science but crystal ball gazing":

> It may be, but you see if you read enough about expert opinion you will find in enough reading that there comes a time when it is difficult to draw a line between an opinion of an expert and pure speculation of an expert. I might say from what Mr. Webb has told me this would fall into a traditional classification of expert opinion. I have listened to what you might consider as extremely speculative testimony that is admitted. Most of it is considered to be for credibility questions, weight questions and you may argue all this to the jury. I am only determining the question of admissibility.

1969), § 1525, did not usurp the function of the jurors but was merely an aid in their evaluation of the surveillance photographs.* Its admission did not constitute error, much less reversible error. *United States* v. *Wolfson,* 405 F.2d 779 (2d Cir. 1968), *cert. denied,* 394 U.S. 946 (1969).

POINT IV

The District Court properly ruled that no inference could be drawn against the Government for not corroborating Roland's testimony concerning the stolen vehicles.

(1)

The witness Roland testified that he and Woody Green, on the night before the bank robbery, rode a bus until they came upon the car rental agency on Church Avenue from which they ultimately stole a car by obtaining the keys at gunpoint from the attendant (211-212). Roland was not sure of either the name of the rental agency or even its approximate location; nor did he know the make, model or registration of the car. In fact, he knew only that it was "like a little foreign sports car" (213). Roland was equally as imprecise as to where he abandoned the car after the bank robbery stating that after dropping the other three off at Green's apartment, he parked the car about two blocks away (221). Moreover, he did not recall whether or not he left the keys in the car at the time he abandoned it (295).

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* In his summation, Assistant United States Attorney Clarey, did not expand upon the purpose of Webb's testimony, but simply stated:

> "Webb was brought into this courtroom to testify for one reason and one reason only, to teach us, you and me and everybody here, how to look at a photograph" (T-544).

Appellant's defense counsel at no time during trial made any effort, either by asking the prosecutor or by request for an investigation or subpoenas, to ascertain whether the car had ever been reported stolen or recovered. Moreover, during Roland's second day on the witness stand, after which he had an overnight opportunity to investigate the matter, defense counsel asked only a few brief questions of Roland about the car on cross-examination (293-294). The first time counsel raised the issue was during his summation when it was clearly too late for any evidence in that regard to be brought before the jury (517-518).

In that summation, counsel told the jury, ". . . what I tell you about the law is not the law . . ." and, "if I in the course of my summation touch upon the law and the Judge in his charge tells you something other than what I have told you, there is no question which law you must follow, and that is the Judge's" (506). He further told the jury that, in a criminal trial, "insufficient information" is "reasonable doubt" (509) and that "there is really a third kind of evidence, or non-evidence . . ." which he described as " . . . what you did not see in this case. What the Government has not presented to you" (515). Thereafter, counsel pointedly argued to the jury that Roland's account of stealing the car was terribly suspect (and, therefore, his entire testimony) because the Government had introduced no evidence to corroborate the stolen car episode. "Where," counsel rhetorically asked, "is police testimony as to the stolen car?" "Was it recovered?" (516). Counsel then stated:

> Now, introduction of evidence of the recovery of that car two blocks away from Willie Green's house would have been powerful, powerful testimony in [shoring] up the testimony of that man. But we didn't see it, and you may ask yourself why not, and you may infer from that the reason why not is the reason he didn't park it there. If he had parked

> it there, you could be sure that a thorough prosecutor like Mr. Clarey would have brought you that car, or somebody that picked up that car, a police officer, and said, "I picked it up. It was two blocks from Woody Green's house."
>
> Remember, Mr. Roland said, "I left it there. I don't know if I left the keys there or not."
>
> That car was abandoned two blocks away from Woody Green's house. This isn't a pickpocket case; this is a bank robbery (516-517).

Thus, up and until that point in his summation, counsel was simply and properly arguing the weakness of the Government's case based upon the absence of evidence which would have tended to corroborate Roland; albeit in a minor respect.* In an abrupt shift, however, counsel began to instruct the jury erroneously; that "you may infer that failure to bring forward a fact which is important in the proof of their [the Government's] case, you may infer from that that fact had it been brought forward would not have been favorable to the Government's case. If they told you w[h]ere the car was, if it was recovered . . ." (522). Counsel got no further, however, because Judge Mishler interrupted. He stated:

> "I do not agree with that principle of law and I will charge you on the failure of the Government to,

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* Counsel stated:

> "I suggest to you rather than to look for other facts for corroboration [e.g., the fingerprints and surveillance photographs] you look to see whether that man [Roland] can be believed, as I say, he cannot, and whether . . . there is enough corroboration to back up the other facts in the case. That is the way to look at the corroborating in this case" (520-521).

Judge Mishler, in turn, instructed the jury that: "If a witness testified before you under oath falsely, intentionally, as to a material fact, you may disregard all that witness' testimony on the theory that the witness is unworthy of belief" (580).

one, produce witnesses, and two, the failure to produce evidence, enough evidence to satisfy its burden. They are two separate principles" (522).

In his charge to the jury immediately following his instructions concerning reasonable doubt, Judge Mishler expanded upon his earlier statement:

> Reasonable doubt may arise from the evidence or from the failure of the Government to produce evidence. The defendant is not obliged to produce any evidence. Now, Mr. Cohn made some reference to the failure of the Government to produce some proof through two witnesses. A failure of the Government to produce the man who Mr. Roland says was assaulted or robbed at the Hertz Car Rental Agency and neither documents or testimony of where the stolen car was abandoned. This is not inconsistent —the charge I am about to give you is not inconsistent with what I said. A reasonable doubt may arise from the failure of the Government to prove its case and that includes—I am sorry, strike that. A reasonable doubt may arise from the failure of the Government to produce proof, and that the defendant is not obliged to produce any proof, doesn't have to subpoena witnesses. However, Mr. Cohn said that you may infer from the failure of the Government to produce those two witnesses that if they were produced they will give testimony that would weaken the Government's case or contradict Mr. Roland. That's where I differ with Mr. Cohn. You should be advised that even though the defendant need not produce proof, he still has the power to subpoena anyone he wants to and where we find, and where the law finds, that witnesses are controlled by neither party, or putting it affirmatively, are under the equal control of the parties, you may not draw an adverse inference from the Government's failure to produce the witnesses.

(2)

On appeal, appellant draws upon the basic rule set forth in *United States* v. *DiBrizzi,* 393 F.2d 642, 646 (2d Cir. 1968), namely, that the failure to produce a witness equally available to both parties is open to an inference against either party, and contends that Judge Mishler was mistaken throughout in his statements to the jury. Specifically relying upon the rule in *DiBrizzi* he contends (Points IV and VI) that the witnesses who could have corroborated Roland's account of the stolen car were, at least, "equally available" and therefore (1) that he should have been permitted to continue his summation along that vein and argue a specific adverse inference; and (2) that the Court's charge erroneously instructed the jury that no adverse inference could be drawn. In Point V, appellant contends that that the above-quoted portion of the charge drew impermissible attention to his failure to offer evidence and, thereby, derogated his right to remain silent and rest upon the Government's burden of proof. Moreover, this attention, he argues, was further unwarranted because the witnesses who could have corroborated Roland's testimony concerning the stolen car were, in all likelihood, police officers who one could hardly say were "equally available" to appellant. Each of appellant's contentions are without merit.

(3)

While it is well recognized, as stated in *United States* v. *DiBrizzi, supra,* at 646, that "[w]ithin broad limits counsel for both sides are entitled to argue the inferences which they wish the jury to draw from the evidence," it is also well recognized that a trial judge must "keep the prosecution in a criminal case within bounds; he must not allow it by implication to invoke unsound legal doctrines". *United States* v. *Cotter,* 60 F.2d 689, 692 (2d Cir. 1932). Thus, where defense counsel puts forward to the jury, in the guise of a factual argument, an unsound proposition of law, a trial judge may properly interject and correct the misstatement. As stated in *United States* v. *Sawyer,* 443 F.2d 712, 713-4 (D.C. Cir. 1971):

> "The court should exclude only those statements that misrepresent the evidence or the law, introduce irrelevant prejudicial matters, or otherwise tend to confuse the jury. . . . If counsel's view of the applicable law differs from that of the court, then of course there is a great danger of confusion. In that case the jury should hear a single statement of the law from the court and not from counsel" (footnotes omitted).

On this record, it is clear that defense counsel's attempt to comment on the failure of the government to produce further evidence concerning the stolen car "was a plot designed to embarrass the government and . . . had no real possibility of affording a defense that could create a reasonable doubt in the mind of a reasonable juror." *United States* v. *Soles,* 482 F.2d 105, 109-110 (2d Cir.), *cert. denied,* 414 U.S. 1027 (1973). Defense counsel made no attempt to subpoena the witness who he speculated existed, even though he was aware of the situation concerning the car from Roland's direct testimony and from his cross-examination. Thus, while there was an overnight delay in the middle of Roland's cross-examination, defense counsel did not attempt to solicit any information from the Assistant United States Attorney concerning the identity or whereabouts of any additional witnesses. If he had done so he would have learned, as he may already have surmised from the testimony of Wilbur Roland, that the government did not have any further evidence concerning the theft of the car.

In addition, the defense did not seek to establish that the government failed to use reasonable diligence in its search for the witnesses, nor did the defense seek to question the assistant out of the jurors' hearing to determine what search had been made or if a continuance might be productive. Thus the only reference to the incident to which the unknown witnesses were supposed to testify about

was by Wilbur Roland who stated that he didn't know what agency they had robbed the car from (212), or what kind of car it was (he testified that it was "like a little foreign sports car [213]), or exactly where he left it after the robbery (221-222). In sum, there is nothing on the record to support a claim that the witnesses were available to the government.

In this case, therefore, appellant's trial counsel went well beyond a simple factual assertion when he urged the jury to infer, generally, that the "failure to bring forward a fact which is important in the proof of their [the Government's] case, you may infer from that . . . fact had it been brought forward would not have been favorable to the Government's case" (522). It was nothing more than a broad and incorrect statement of law which Judge Mishler properly corrected. The rule in this Circuit with respect to the drawing of inferences from a party's failure to call a witness or otherwise produce evidence is twofold. Where availability has been established, it is proper for the jury to be advised that it may draw an inference against the party who has access to the witness or evidence. *United States* v. *DiBrizzi, supra,* at 646. Nevertheless, where no foundation has been laid to show availability, 2 Wigmore, Evidence, § 285 et seq. (3rd Ed.)—as in this case—then no unfavorable inference may be drawn. *United States* v. *Super,* 492 F.2d 319, 323 (2d Cir. 1974); *United States* v. *Secondino,* 347 F.2d 725, 727 (2d Cir.), *cert. denied,* 382 U.S. 931 (1965). In short, the principle of law stated in *DiBrizzi* is not applicable to this case.

Similarly, Judge Mishler's charge concerning the matter was without error for it properly advised the jury that no adverse inference should be drawn from the Government's failure to produce a witness who was not known and certainly not available. It did not have the tendency of focusing the jury's attention on the appellant's failure to offer evidence or testify. Cf., *United States ex rel. Leak*

v. *Follett*, 418 F.2d 1266, 1270 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970).*

Finally, Judge Mishler placed defense counsel's argument in proper perspective when he charged the jury that a "[r]easonable doubt may arise from the evidence or from the failure of the Government to produce evidence" (564). See *United States* v. *Hephner*, 410 F.2d 930, 934 (7th Cir. 1969). That, after all, was the proper tenor of defense counsel's argument with respect to the stolen car episode. Thus, while it was proper for counsel to urge the jury to disbelieve Roland and thereby reject the Government's case, he could not properly urge that the Government had purposely avoided calling a witness for fear that his testimony would be embarrassing. Cf. *United States* v. *DeAngelis*, 490 F.2d 1004, 1011 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974) (concurring opinion, Mansfield, *J.*).

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* Judge Mishler's charge adequately instructed the jury on the Government's burden of proof as well as the right of the appellant not to offer any evidence:

> The law does not compel a defendant in a criminal case to take the witness stand and testify. No presumption of guilt may be raised and no unfavorable inference of any kind may be drawn in the failure of the defendant to testify. A defendant as previously charged may rely on the government to prove its case. It would be improper for you to discuss the failure of the defendant to testify during your deliberations. You may not draw any unfavorable inference from the defendant's failure to offer any proof. I indicated to you that there is no obligation on the defendant to offer any proof. The test is whether the Government has proved its case beyond a reasonable doubt (578).

Moreover, appellant's attempt to distinguish *United States* v. *Crisona*, 416 F.2d 107 (2d Cir. 1969) and the cases cited therein, is without application to the situation in this case. In those cases, the judge charged that an inference could be drawn against the defendants for their failure to call certain witnesses. But here Judge Mishler fully protected appellant and charged that no inference could be drawn against appellant for his failure to produce evidence.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

December 2, 1974

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* The United States Attorney's Office wishes to acknowledge the assistance of Harvey A. Herbert and Jon M. Lewis in the preparation of this brief. Mr. Herbert is a third year law student at Brooklyn Law School. Mr. Lewis is a June 1974 graduate of St. John's University Law School.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 4th day of December, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Frederick Cohen, Esq.
640 Broadway
New York, NY 10012

Sworn to before me this
4th day of December 1974

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1976

Deborah J. Amundsen